Office-Supreme Court, U.S.
FILED
SEP 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1695

In the Supreme Court of the United States

OCTOBER TERM, 1980

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
PETITIONER

v.

J.E. PELAEZ DEL CASAL AND EASTERN AIRLINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a union breaches its duty of fair representation when it refuses to provide an attorney to represent a member of the bargaining unit in a discharge proceeding solely because the employee is not a member of the union.

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This brief is filed in response to the Court's invitation to the Solicitor General to state the views of the United States.

STATEMENT

1. Respondent J.E. Pelaez Del Casal was employed by respondent Eastern Airlines as a pilot. While so employed, Del Casal twice attempted to become a member of petitioner Air Line Pilots Association, but was denied membership because petitioner's members questioned his competence as a pilot. In May 1975, Eastern discharged Del Casal on the ground that he was an unsafe and incompetent pilot (Pet. App. 2a).

Following his discharge, Del Casal filed a grievance pursuant to the collective bargaining agreement then in force between petitioner and Eastern, which allowed him to submit his discharge for review by Eastern officials. In this first

level grievance procedure, one of petitioner's staff attorneys, John Loomos, represented Del Casal (Pet. App. 2a). When the grievance was rejected at this stage, Del Casal requested that petitioner submit his case to the Eastern Airlines Pilots System Board of Adjustment. This arbitration panel was established under the collective bargaining agreement, as required by the Railway Labor Act (45 U.S.C. 184), to settle disputes between Eastern and its pilots. Petitioner did submit the case, but, prior to Del Casal's hearing, instructed Loomos to cease representing Del Casal because Del Casal was not a union member. Loomos informed Del Casal of his withdrawal, and advised the pilot to hire an attorney, which he did (Pet. App. 2a-3a).

Del Casal was represented by his retained counsel throughout the System Board proceedings, which encompassed several days of hearings over the course of a year. The System Board ultimately ruled in February 1977 that Eastern was justified in discharging Del Casal. Del Casal then brought this action in the United States District Court for the Southern District of Florida, seeking to have the System Board decision set aside and alleging that petitioner had breached its duty of fair representation by refusing to provide an attorney to represent him before the Board (Pet. App. 4a).

2. The district court refused to set aside the Board decision sustaining the discharge, but agreed that petitioner had breached its duty of fair representation (Pet. Supp. App. 1a-11a; 465 F. Supp. 1254 (1979)). The court found that Del Casal was entitled to damages in the amount of the attorney's fees paid to his retained counsel and other incidental expenses. A jury trial to determine damages resulted in a verdict of $35,000. The court entered judgment in that amount (Pet. Supp. App. 14a), and both petitioner and Del Casal appealed.

On appeal, the Fifth Circuit affirmed the decision regarding Del Casal's discharge as well as the finding of a breach of the duty of fair representation (Pet. App. 1a-13a; 634 F. 2d 295 (1981)). The court of appeals recognized that this duty does not require a union to accept a prospective member, extend internal union benefits to non-members, or process all grievances, regardless of merit (Pet. App. 9a). However, the court held that petitioner had arbitrarily exercised its authority to represent employees within the bargaining unit by discriminating against Del Casal on account of his non-union status. It concluded: "While ALPA has the authority to decide under what conditions an attorney will be supplied to a grievant, the fact that the grievant is not a member of the union can play no part in that decision" (*id.* at 11a).

Petitioner seeks review in this Court of the finding that it breached its duty of fair representation.

DISCUSSION

This case does not present any issue warranting further review. The decision of the court of appeals is correct and is consistent with decisions of this Court, of other courts of appeals, and of the National Labor Relations Board in analogous cases.

1. Petitioner here argues that its duty was only to permit Del Casal's case to be raised before the System Board. Petitioner denies that it had any duty to ensure that Del Casal's protest of his dismissal was adequately presented to that board, even though the union provided attorneys in such instances for its own members, and offered Del Casal no adequate alternative representation. The decisions of this Court establish that the duty of fair representation cannot be so narrowly construed.

In *Electrical Workers* v. *Foust*, 442 U.S. 42, 46-48 (1979), the Court explained the development of the duty of

fair representation under the Railway Labor Act.[1] The duty was first recognized in *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192 (1944), where the Court held that when Congress empowered labor unions to bargain exclusively on behalf of all members in a bargaining unit, it imposed a correlative duty to exercise the power fairly. "The fair representation doctrine thus serves as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' *Vaca* v. *Sipes*, [386 U.S. 171, 182 (1967)]." *Electrical Workers* v. *Foust, supra*, 442 U.S. at 46-47. The Court noted that this duty extends beyond negotiation to both administration and enforcement of collective bargaining agreements (*id.* at 47). It concluded: "In particular, a union breaches its duty when its conduct is 'arbitrary, discriminatory, or in bad faith,' as, for example, when it 'arbitrarily ignore[s] a meritorious grievance or process[es] it in [a] perfunctory fashion.' *Vaca* v. *Sipes, supra*, at 190, 191" (*ibid.*).

Even before its decision in *Foust*, this Court had made clear in a variety of contexts that a union's duties include adequately representing a member of the bargaining unit in grievance or discharge proceedings.[2] This obligation is thus

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[1]Except for 45 U.S.C. 153, the provisions of the Railway Labor Act, 45 U.S.C. 151 *et seq.*, are applicable to air carriers (45 U.S.C. 181).

[2]In *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957), this Court held that "[t]he bargaining representative can no more unfairly discriminate in [protecting employee rights secured by the collective bargaining agreement] than it can in negotiating a collective agreement" (footnote omitted). The National Labor Relations Act (29 U.S.C. 151 *et seq.*) creates an analogous duty of fair representation (*Electrical Workers* v. *Foust, supra*, 442 U.S. at 46-47 n.8). Under that Act, the Court has held that the duty includes administration as well as negotiation of a contract. See, *e.g.*, *Humphrey* v. *Moore*, 375 U.S. 335, 342-343 (1964) (duty of fair representation would be breached if union deceived members about their rights and prevented a fair hearing before joint union/employer grievance committee); *Hines* v. *Anchor Motor Freight,*

an integral part of the federal labor policy that requires the employee to utilize the grievance machinery provided in the collective bargaining agreement before seeking judicial relief. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976).

Allowing Del Casal to appear before the System Board without providing representation solely because he was not a union member constituted precisely the sort of arbitrary denial of adequate protection forbidden by this Court's decisions. The refusal to provide a lawyer had nothing to do with the merits of the pilot's grievance, and the union cannot now claim that it denied representation on this ground. For the same reason, the judicial affirmance of the Board's decision sustaining his discharge does not retroactively relieve the union of its duty to provide adequate representation.

Petitioner's attempt to justify its refusal to provide adequate representation on the ground that Del Casal had not contributed to the cost of providing that representation is equally without merit. The very "free rider" argument made by petitioner here (Pet. 11-12) has been rejected by the National Labor Relations Board, in holding that a union cannot charge a non-member a fee to cover the expenses of processing his grievance if it provides the same service to

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Inc., 424 U.S. 554, 562-567 (1976) (finality provisions of the contract do not apply if the quality of representation by the union at discharge proceedings seriously undermines the integrity of the arbitral process). The decision below also comports with rulings by other courts of appeals. In *Miller* v. *Gateway Transportation Co.*, 616 F. 2d 272, 277 (7th Cir. 1980), the court found that providing a representative to read an employee's grievance to a grievance panel would not satisfy the union's obligation to the employee. In *Smith* v. *Hussmann Refrigerator Co.*, 619 F. 2d 1229 (8th Cir.), cert. denied, 449 U.S. 839 (1980), the court found that a union breached its duty when it left to the employer the task of representing certain employees within the bargaining unit during grievance proceedings.

members without charge. *Hughes Tool Co.*, 104 N.L.R.B. 318, 325-326 (1953); *International Association of Machinists, Local 679 (Canfield Rubber Co.)*, 223 N.L.R.B. 832, 835-836 (1976). The union's action here in refusing to provide representation, and forcing Del Casal to arrange and pay for his own representation solely because he was not a union member, would *a fortiori* violate NLRB precedent.

Petitioner claims that there is a conflict among the courts of appeals because other courts have held that a union need not provide counsel for an arbitration proceeding (Pet. 10-11). The cases upon which petitioner relies do not support this claim. *Golden* v. *Local 55, Association of Firefighters*, 633 F. 2d 817, 821-822 (9th Cir. 1980), stands for the proposition that a union may provide an attorney for some, but not all, of its members, so long as the choice is made on a reasonable basis, and not on racial grounds. The court below also recognized the union's right to make rational decisions about when it would provide an attorney, but held that union membership, like race, is an impermissible basis for decision (Pet. App. 11a). In *D'Elia* v. *New York, N.H. & H. R.R.*, 230 F. Supp. 912, 916 (D. Conn.), aff'd, 338 F. 2d 701 (2d Cir. 1964), cert. denied, 380 U.S. 978 (1965), the court rejected a claim that because the union had failed to provide its member with an attorney, the National Railroad Adjustment Board had violated the member's constitutional rights by hearing the grievance. Finally, in *Grovner* v. *Georgia-Pacific Corp.*, 625 F. 2d 1289, 1291 (5th Cir. 1980), the court held that the union's duty to provide adequate representation at an arbitration hearing was satisfied by providing a union representative, rather than an attorney. None of these cases suggests that any other court of appeals would conclude that petitioner properly refused to provide counsel to Del Casal solely because he was not a union member.

Petitioner's reliance on cases in which unions were not required to provide other specific benefits (Pet. 9-10) is similarly unpersuasive. Unlike those cases, this one involves the processing of grievances, an area that this Court has found to be comprehended within the duty of fair representation. Contract administration is no less important than contract bargaining, and the courts below therefore reasonably concluded that refusing to provide a pilot with a lawyer in a grievance proceeding solely because of his non-union status differs significantly from denying him internal benefits such as insurance. Contrary to petitioner's implication (Pet. 11), there is nothing in *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), to the contrary. In contrast to the "agency shop" agreement discussed in that case, petitioner's contract with Eastern contained no union security provision requiring Del Casal to pay dues or fees as a condition of continued employment.[3] Moreover, as noted *supra*, page 1, Del Casal had sought to become a union member and thus to assume the financial obligations of membership, but the union had denied him membership.

2. Petitioner also claims (Pet. 5-9) that the courts below erred because there was no showing that its failure to provide an attorney resulted in Del Casal's loss of employment. Contrary to petitioner's contention, this Court's holdings do not make such a showing a prerequisite to finding a breach of a union's duty of fair representation.

Nor is there merit in petitioner's contention (Reply Br. 2) that this Court's recent decision in *United Parcel Service, Inc.* v. *Mitchell*, No. 80-169 (Apr. 20, 1981), supports its

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[3]Such a provision would violate the Florida Constitution (Fla. Const. art. I § 6). See *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 750 (1963).

position.[4] Nothing in that decision casts doubt on the continuing validity of *Czosek* v. *O'Mara*, 397 U.S. 25, 28-29 (1970), in which this Court established that a fair representation suit has an existence separate from an action against an employer for wrongful discharge, or *Electrical Workers* v. *Foust, supra*, 442 U.S. at 47, in which the Court further recognized that the right to bring fair representation suits is implied by the Railway Labor Act. Similarly, the National Labor Relations Board has held that a union breaches its duty of fair representation when it inadequately presents an employee's grievance, even if the grievance itself is properly rejected. *Truck Drivers, Oil Drivers, etc., Local 705 (Aaron Kesner)*, 209 N.L.R.B. 292, enforced, 532 F. 2d 1169 (7th Cir. 1974), cert. denied, 429 U.S. 1022 (1976). The decision

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[4]Petitioner suggests that the Court in *United Parcel Service* held that the employee's claim against the union for abrogation of its duty of fair representation must be dismissed because of the untimeliness of the suit against his employer challenging his discharge (Reply Br. 2). But, as Justice Stevens emphasized, the employer was the only petitioner in *United Parcel*, and it expressly disavowed any position on the status of the employee's claim against the union. Slip op. 1-2 & n.1 (Opinion of Stevens, J.). As Justice Stevens further noted (*id.* at 3-4 n.4), the two claims are distinct:

> [T]he determination whether the employer breached the agreement may be highly relevant to the amount of damages caused by the union's alleged breach of duty, but it is not necessarily controlling with respect to the threshold question whether there was any breach of duty by the union at all. For example, if, solely for reasons of racial bias, a union processes a discharged employee's grievance in bad faith, the union breaches its duty of fair representation. Cf. *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192. The fact that the underlying discharge may not have violated the collective-bargaining agreement does not necessarily absolve the union of liability for its breach, although it may limit the size of the employee's recovery against the union.

Petitioner incorrectly asserts (Reply Br. 3 n.2) that the Court's "disposition of the plaintiff's [fair representation] claim" against the union was inconsistent with Justice Stevens' analysis. But there was no such "disposition" because that claim was not before the Court.

below is thus consistent with the national labor policy and effectuates the purposes of the Railway Labor Act by requiring a union to process grievances adequately or to reject them on their merits, not on the employee's membership status.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1981

DOJ-1981-09